No. 14,565

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLARD A. WINHOVEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

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JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant moved the District Court for the Northern District of California for an order vacating the judgment in his case pursuant to Section 2255 of Title 28 United States Code on July 9, 1954 (Tr. 8). United States District Judge Louis E. Goodman denied appellant's motion on July 16, 1954 (Tr. 64). Appeal was then made to this Court.

FACTS.

On September 4, 1942, Winhoven and a co-defendant, Sivyer, were convicted in the District Court for the Northern District of California of the armed robbery of a United States Post Office. They received a mandatory sentence of twenty-five years imprisonment. No appeal was taken from the judgment of conviction.

More than six years later, on January 20, 1949, Winhoven filed in the District Court for the Northern District of California a motion, pursuant to 28 U.S.C., Section 2255, to vacate the judgment and sentence. The ground for relief stated was that he had been denied the effective assistance of counsel upon the trial by the appointment of the same attorney to represent both him and his co-defendant, who had conflicting interests. Solely upon the basis of the motion, and the files and records of the case, and without a hearing, Judge Roche determined that Winhoven was not entitled to relief and denied the motion. No appeal was taken.

On October 30, 1950, Winhoven filed in the District Court for the Northern District of California a petition for a writ of habeas corpus making the same claim for relief as he had in the motion to vacate. Judge Roche issued the writ and conducted a hearing upon the allegations of the petition. At the hearing, Winhoven was personally present and testified, as well as did other witnesses. Judge Roche concluded that the claims of the petition were not sustained by the

evidence, and upon written findings, he entered judgment discharging the writ and dismissing the petition. From this judgment Winhoven appealed.

The Court of Appeals refused to consider the appeal on the merits. 195 F.2d 181 (February 28, 1952). It held that the District Court for the Northern District of California was without jurisdiction to entertain the petition for a writ of habeas corpus, since a motion to vacate was the petitioner's proper remedy. It further held that, treating the petition for a writ as a second motion to vacate, the District Court for the Northern District of California was not "entitled" to consider it, because the decision on the first motion to vacate was not void and subject to collateral attack in such a second motion. Therefore Judge Roche's order dismissing the petition was affirmed.

Thereafter, on May 1, 1952 Winhoven filed in the District Court for the Northern District of California a motion, pursuant to Rule 60(b) Federal Rules of Civil Procedure, to set aside the order denying his first motion to vacate. The District Court for the Northern District of California denied his motion on the ground that no claim was made that the order was the result of mistake, inadvertence, surprise or excusable neglect. On appeal from this denial, the Court of Appeals remanded the matter to the District Court for the Northern District of California to determine whether the order denying the first motion to vacate was void, because it had been made without, according to Winhoven, a hearing (201 F2d 174, Dec.

31, 1952). In accordance with the mandate of the Court of Appeals, the District Court for the Northern District of California considered the contention that the order was void, and held that it was not, inasmuch as the failure to bring Winhoven before the District Court for the Northern District of California for a hearing upon the first motion to vacate was merely error that should have been raised on appeal. Consequently, the District Court for the Northern District of California again denied Winhoven's motion under Rule 60(b), Federal Rules of Civil Procedure, to set aside the order denying his first motion to vacate. 14 F.R.D. 18 (Mar. 7, 1953). From this denial Winhoven appealed.

Upon this appeal, the Court of Appeals agreed that the ground for relief asserted by Winhoven in his motion to set aside the order denying his first motion to vacate should have been raised on appeal from that order. But, this Court also noted that in any event the District Court for the Northern District of California was without jurisdiction to entertain the first motion to vacate because Winhoven, at the time the motion was made, was serving, concurrently with the sentence under attack, another admittedly valid sentence. For one or both of these reasons the appeal was dismissed. 209 F.2d 417 (Dec. 7, 1953).

On July 9, 1954, Winhoven filed the present and, in effect, the third motion to vacate his judgment of conviction and sentence. In this motion, he made the same claim for relief as in the previous motions; that

he was denied the effective assistance of counsel upon the trial.

(See Order granting leave to appeal in forma pauperis (Tr. 68-71).)

ARGUMENT.

I. THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN APPELLANT'S MOTION.

Appellant has three times been before this Court (*Winhoven v. Swope* (9th Cir.), 195 F.2d 181; *Winhoven v. United States* (9th Cir.), 201 F.2d 174; *Winhoven v. United States* (9th Cir.), 209 F.2d 417). These cases, we believe, are determinative of the appeal in this case.

Section 2255 of Title 28 United States Code provides in part as follows:

> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

Winhoven first filed a motion pursuant to Section 2255 on January 20, 1949 (Tr. 68). The ground urged on that occasion was that he had been denied the effective assistance of counsel upon the trial. This same ground was urged in the instant motion (Tr. 10-14). No appeal was taken from the denial of this motion. This Court held in appellant's last case that after failing to appeal from the original 2255 "he is now without the right to seek the same relief which he

could have had by such appeal''. In this case the Court also held that Winhoven's appeal was frivolous.

On October 30, 1950 Winhoven filed a petition for a writ of habeas corpus making the same claim for relief as he had in the motion to vacate (Tr. 69). A full hearing was conducted upon the merits. Winhoven was personally present and testified as well as did other witnesses (Tr. 69). The Court held that the claims of the petition were not sustained by the evidence and discharged the writ (Tr. 69). Winhoven appealed from this judgment and this Court, at 195 F.2d 181, held that the Court is without jurisdiction to entertain a writ of habeas corpus after a denial of relief under Section 2255. The Court further held that even considering the writ of habeas corpus as a second motion under Section 2255 was not one that the District Court was entitled to consider (page 183).

The present case is based on the same grounds as the case last cited and should be denied on the authority of *Winhoven v. Swope* (9th Cir.), 195 F.2d 181, 183. Appellant "not having sought certiorari, this decision is the law of the case." *Winhoven v. United States* (9th Cir.), 209 F.2d 417, 418.

On March 7, 1953, in an opinion reported at 14 F.R.D. 18, the District Court denied a motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside the order denying appellant's first motion to vacate (Tr. 70). This decision was affirmed by this Court at *Winhoven v. United States,* 209 F.2d 417. Certiorari was not sought from this decision.

Not having sought certiorari, this decision is the law of the case. *Winhoven v. United States* (9th Cir.), 209 F.2d 417, 418.

There is admittedly a valid denial of the first 2255 motion. Since Section 2255 provides that a second motion need not be entertained and this Court has held that a Court is without jurisdiction to entertain a successive motion for relief under Section 2255 (*Winhoven v. Swope*, 195 F.2d 181, 183), the District Court in the instant case was not entitled to consider appellant's motion.

Even assuming that the Court of Appeals for the Fifth Circuit is correct when it states that a Court may entertain a successive motion under Section 2255 (*Barrett v. Hunter* (5th Cir.), 180 F.2d 510; *Hallowell v. United States* (5th Cir.), 197 F.2d 926), the Court need not have done so in the present case. In the *Hallowell* case the first 2255 motion did not involve the same allegations made in the second 2255 motion. In the present case the two motions are made on identically the same ground. Therefore, there would be no reason for entertaining the second successive motion. Winhoven has had his case considered on the merits. Judge Roche decided the facts adversely to him on his petition for a writ of habeas corpus filed October 30, 1950 (Tr. 69). This petition could have been considered a motion under Section 2255 because addressed to the same Court which originally sentenced appellant. As a matter of fact, this Court in *Winhoven v. Swope,* 195 F.2d 181, apparently

treated the writ of habeas corpus as a second 2255 motion. Appellant received a full hearing in that case. He has had the decision on the merits that he desires. He can ask for nothing more. Appellant has had numerous chances to adjudicate his case. All decisions have been adverse to him. The present case should finally determine the Winhoven saga.

Dated, San Francisco, California,
January 17, 1955.

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